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ABSTRACT

This paper provides an analysis and review of recent court cases in which advertising was a major factor in determinations as to whether a breach of warranty or a false advertising claim existed. Special attention is given both to implied and to expressed warranty. When possible, discussion is structured to provide definitional or rule-making assistance. It is noted that courts have found that advertisements are part of the warranty if they are made to create an image for the ultimate purchaser of the product, and that even the use of disclaimer of warranty does not immunize any of the principals in the transaction. In addition, the paper notes that liability caused by a product and traceable to negligent advertising is beyond reach of disclaimer. The paper also discusses fraud, deceit, misrepresentation, and the relationship between case precedents and actions since the passage of the Magnuson-Moss Warranty Act in 1975. (Author/DF)

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THE COURTS, THE AGENCIES AND THE ADVERTISER:

DOES THE SPIRIT REALLY GIVE LIFE?

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THE COURTS, THE AGENCIES AND THE ADVERTISER:

DOES THE SPIRIT REALLY GIVE LIFE?

"For the letter killeth, but
the Spirit giveth life."

--Supreme Court of the United States

"Under the enlightened guidance of these words, the courts have steered the principle of implied warranty from a repressive precept bound by privity to a cumulative and strengthing doctrine of public policy in protecting the consumer against both the seller and the manufacturer."[1]

Because an advertisement commonly leads a consumer to enter into a contractual relationship with a manufacturer or seller, close examination of advertising used to promote a product often plays a pivotal role in court determinations as to whether a warranty exists.[2]

Advertisements are designed to have a fundamental influence on the purchasing of a product. It is through advertisements that a potential consumer learns that a product is available, what the product is designed to do, how it does it and what the expected results are.

But it is not these functional aspects which have led to the courts' increasing awareness of advertising. Improved, sophisticated research techniques in the social sciences have been applied to both marketing and advertising. The increased effectiveness of advertising has resulted in a rapid growth of advertising on local, national and international scales. Simultaneously rather dramatic changes in purchasing and sales patterns have occurred. All these factors have combined to create much greater consumer awareness of advertising itself and of its effects. Undoubtedly this public awareness has been of a primary influence in causing the courts to turn toward advertising itself in many cases to determine if a warranty has, in fact, been created.

In the past, the doctrine expressed in the maximum "caveat emptor" was often applied where there was no set warranty and no deceit on the part of the seller.

However, the trend in case law is to set aside the "caveat emptor" doctrine in determining liability and hold the advertisement responsible when the content of advertisement allegedly caused injury to the user of the product.

The number of liability cases in which the advertiser may or may not be held responsible is rapidly increasing as the courts are proportionally holding that the remedies of injured consumers "ought not to be made to depend on the intricacies of the law of sales. The obligation of the manufacturer should not be based alone on privity of contract. It should rest...upon the demands of social justice."[3]

This expounding of the law of sales has brought advertising under close scrutiny in many liability cases.[4] As the court stated in Ford Motor Co. v. Mathis, "One who advertises a product as of his own manufacture is liable for the fault of the manufacturer of one of the component parts."[5]

This is in harmony with the rules set forth in the Restatement of Torts (2d sec. 400) which declares that one who puts his own product or chattel manufactured by another is subject to the same liability as though he were the manufacturer.

In Rubbo v. Hughes Provision Co.[6] the court ruled that an advertiser, on the strength of his advertisement indicating that he was the seller, was subject to the same liability as would have been imposed if he were the seller.

The danger of misleading impressions is illustrated in a recent case involving an oil company's national advertisements. The impression that its dealers were skilled in automotive servicing as well as promoting the sale of its products resulted in the company's being held liable for damages sought by the buyer of a used car from a service station operator who sold the oil company's products. Neither the ownership of the automobile nor any proceeds from the sale were the property of the oil company.

Promises, express or implied, are characteristic of all product advertisements.[8] Therefore, as stated by the court in King v. Ohio Valley Terminex, all the circumstances of a sale "including advertisements" are to be considered in determining if there is a warranty. All facts and circumstances surrounding the

advertisement, and especially the asserted "warranty language" of the advertisement must be considered.

The major ground for liability is the concept that advertising constitutes an express warranty. Nevertheless, there is authority to the effect that an advertisement may give rise to an implied warranty.

In order to understand the meaning of implied warranties, it is necessary to define the term "warranty". The definition as stated in 77 Corpus Juris Secundum § 301:

> A warranty is a statement of representation made by the seller of goods, contemporaneously with, and as a part of, the contract of sale, although collateral to the express object of it, having reference to the character, quality of life of the goods, and by the promises or undertakes to insure that certain facts are or shall be as he represented them.[9]

An express warranty exists when a seller makes any statement of fact or promise relating to the goods that the buyer relies on in purchasing the goods. "These statements may include oral or written representations (or both) about the product, the description of the goods, samples or models, drawings of the object, reference to type of goods previously sent, or reference to market quality of a certain standard."[10]

Although case law is limited in this area, special problems are presented as an increasing percentage of sales are actually only the finalizing of a sales process which is based primarily on "presale" by an advertisement.

Many potential express warranty claims are, at the present, supplanted by Federal Trade Commission action under its summary "claim substantiation" action. Express warranty, predicated as it is only in the "reliance" standard, is potentially a much more useful consumer action. The two actions can exist at one and the same time. This is evidenced by the Acne-statin case.[11] In fact, if the Congress lessens the regulatory impact of the FTC in the claim substantiation area, the willingness of the courts to protect the consumer is already a matter of record.

Implied warranty arises irrespective of any intention on the part of the seller to create such a warranty. As a matter of public policy, an implied warranty is one imposed by both statutory (in most states) and common law, i.e., implied warranty is one which attaches to certain sales transactions in favor of the buyer, regardless of the words used by the seller, if indeed any words are used.

Under the Uniform Commercial Code, implied warranties are divided into three classifications: title, fitness for a particular purpose, and merchantability.[12] The latter two necessitate an examination of advertising.

As stated in the U.C.C. § 3-315, an implied warranty for fitness for a particular purpose exists where the seller at the time of contracting has reason to know of any particular purpose for which the goods are required and that the buyer is relying on the seller's skill and judgment to furnish suitable goods.[13]

This section of warranty is extended and made applicable to the buyer who relies on the seller's skill and judgment in either furnishing or selecting goods that are suitable for the special needs of the buyer. The language of § 3-315 has been interpreted to impose three requirements on proving breach of implied warranty for fitness for a particular purpose. First, the seller must have reason to know of the buyer's particular purpose in purchasing the goods. Second, the seller must have reason to know of the buyer's reliance on his skills and judgment to furnish appropriate goods. Third, the buyer must rely on the seller's skill and judgment in purchasing the goods.

Advertising statements and demonstrations are particularly vulnerable to challenge with regard to implied warranty claims of fitness for a particular purpose. Although an astonishingly wide range of cases has developed, statements concerning foods and beverages have been especially prone to liability. Although most actions, in the past, have been for problems related to small ticket items, within the last few years automobiles and related advertisements have been the subject of relatively frequent litigation.

Advertisements which create an image may become a cause for corrective or remedial action. In Anderson v. Taylor[14] an advertisement concerning the "wholesome life, sparkle, and purity" of a beverage constituted an implied warranty for fitness for a particular purpose as judgment was awarded in favor of Anderson who found a mouse in a bottled beverage.[15]

Advertising statements concerning a hair-waving preparation gave rise to an implied warranty of fitness in Markovich v. McKesson & Robbins, Inc.[16] The advertisement stated that the product could be used with less inconvenience than competing products, when in fact, it could not.

Product labels and the use of statements for either the label or the package have become special problems. Especially when dealing with products which are under the control of the Food and Drug Administration, labeling itself is a frequent cause for problems. As the FTC has become more involved, labels are now perceived as a form of advertising, and special legal actions are developing.

In Hamon v. Diligani[17] advertising statements on the product label of a household detergent were found to give rise to an implied warranty of fitness. In an action by the buyer of the detergent against the manufacturer and dealer of the detergent for injuries allegedly sustained when some of the detergent spilled on the buyer severely burning her, the Supreme Court of Errors of Connecticut stated:

> The manufacturer or producer who puts a commodity for personal use or consumption on the market in a sealed package or other closed container should be held to have impliedly warranted to the ultimate consumer that the product is reasonably fit for the purpose intended and that it does not contain any harmful and deleterious ingredient of which due and ample warning has not been given. See Crotty v. Shartenberg's-New Haven, Inc., 147 Conn. 460, 467, 162 A 2d 513. Where the manufacturer or producer makes representations in his advertisements or by the labels on his products as an inducement to the ultimate purchaser, the manufacturer or producer should be held to strict accountability to any person who buys the product in reliance on the representations and later suffers injury because the product fails to conform to them. Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 249, 147 N.E. 2d 612; see Prosser. Torts (2d Ed.) p. 506; Williston, Sales (ev. Ed.) Sec. 244 & Cum. Sup. Sec. 244d.[18]

In an action for personal injuries the court found that an implied warranty

of fitness arose from advertisements containing and concerning information about the body of a particular car because of pictures showing the car turning over at a high rate of speed without damage to the car.[19]

In a similar action the court stated that when the manufacturer of a motor vehicle promoted its sale through a large advertising program there is an implied warranty that the vehicle is reasonably fit for the purpose for which it was intended, and that the warranty accompanies the vehicle into the hands of the ultimate consumer.[20]

In a more recent case involving an advertisement depicting a pick-up truck "bouncing around and flying through the air," the court found that the advertisement was a part of the warranty since it was made to create an image for the ultimate purchaser of the product. The court stated: "Any affirmation of fact or promise made by the seller to the buyer as related to the goods as the basis of a bargain creates a warranty." The plantiff was awarded $500 in damages.[21]

Although implied warranty of fitness for a particular purpose would seem to include merchantability, it does not. The implied warranty of merchantability according to the Uniform Commercial Code § 2-314 is a warranty that the goods shall be merchantable "as implied in a contract for the sale of the goods if the seller is a merchant with respect to goods of that kind."[22] Under the Code:

> Goods to be merchantable must pass without objection in the trade under the contract description, and in the case of fungible goods, are of their average quality within the description; and are fit for the ordinary purpose for which such goods are used; and run within the the variations permitted by the agreement, of even kind, quality and quanity within each unit and among all units involved; and adequately contained, packaged and labeled as the agreement may require it; and to conform to the promises or affirmations of fact made on the container or label, if any.[23]

In order for an advertiser to be held liable for breach of warranty, whether express or implied, for fitness or for merchantability, the buyer must establish that he relied on the advertisements in purchasing the goods. Failure to show reliance on the advertising has resulted in numerous unactionable cases.

A passenger injured when the vehicle in which he was traveling left the

highway, rolled over and the roof collapsed could not recover from the manufacturer for misrepresenting the safety of his automobiles in his advertisements because there was no evidence that the buyer relied on the information in purchasing the vehicle.[24]

In order for an advertiser to be held liable for breach of warranty it is also essential that the injured party establish that the statements made in the advertising are negligent, i.e., by making such statements concerning the product that there has been a breach of duty not only toward the injured party, but toward the public at large.

Such negligence was established in Hardy v. Procter & Gamble Mfg. Co.[25], where a detergent that was advertised as gentle enough to put into one's eyes caused blindness after is was used to wash surgical instruments.

Negligence was also found in Jones v. Raney Chevrolet Co.[26] when an automobile advertised as being equipped with dependable and reliable brakes, experienced brake failure.[27]

The advertisement does not have to be proved negligent with regard to the injury at hand for the court to enter judgment to the injured. It is enough that it is negligent to the public at large.[28]

However, in those instances where it is clear from the advertisement itself that the product was in the experimental states of development, the courts have not found negligence.[29]

Moreover, a manufacturer cannot be held liable for a product-related danger unless it appears to the court that he/she knew or should have known of the danger. Consequently, an advertising practitioner cannot be held liable for a warning unless it appears, again to the court, that he/she knew or should have known of the product-related danger. It must be noted, however, that the courts have been less absolute in creating standards by which to establish the "should have known" aspect. Because the case law is so unclear in this area, advertising practioners should exercise caution in developing advertisements in those cases where their own suspicions have been aroused.

A disclaimer of warranty does not immunize any of the principals in the transaction. The seller and/or the manufacturer cannot be granted such protection. Therefore, a disclaimer of warranty does not immunize an advertiser or advertising practioner from liability caused by a product and traceable to negligent advertising.[30]

In a large number of cases of liability, three problem practices have been the basis of the fault: fraud, deceit and misrepresentation. When advertising statements are determined to fall into these classifications the judgments have gone against the advertiser. However, the courts have drawn a distinction between these other legal issues and puffery or "seller's talk." The latter have consistently been ruled unactionable.

In a recent case involving a locking device used on a truck, the district court held that an advertising statement that the device "offered unprecedented safety" was mere puffery or "seller's talk" and not action such to sustain liability.[31] The advertising practioner should note, however, that the difference between puffery and deceit or misrepresentation is not always absolutely clear. When the difference is unclear, if there is a possibility that such a claim would be contributory toward a purchase decision, the courts could easily assess liability.

In most cases the courts have been rather severe in situations where there is provable harm. In an action for the death of sows allegedly caused by their consumption of Economy Stock Powder, the court found that the advertiser was guilty of false deceitful advertising in having represented in his advertisements that the product was beneficial for conditioning hogs and particularly good for brood sows.[32]

Similarly in Marsh v. Usk Hardware Co.,[33] the court found that a circular stating that explosives were "absolutely safe to handle in every way," "cannot be exploded unless confined" and "has been used by hundreds of miners and rock men" without an accident were misrepresentative of the product which exploded without warning and resulted in injuries.

In Cooper v. R.J. Reynolds Tobacco Co.,[34] the widow of a lung cancer victim charged that the company had mislead the consumer and the general public. Advertising was the key to the case as she charged that newspaper advertisements stated "20,000 doctors say that cigarettes are healthful," and television and radio advertisements claimed that cigarettes were not harmful to the respiratory system. She further charged that these advertisements represented to the lung cancer victim and the public at large that cigarettes were wholesome, fit for use and unlikely to cause any disease or harm. The plantiff presented evidence to incicate that the company's claims were untrue and known to be untrue at the time of their dissemination and that the company intended for the public to rely on the advertisements to purchase the product. Her husband did rely on the advertised statements and purchased only such cigarettes, thereby contacting lung cancer and being done harm. The federal court found that the widow had basis for action, based upon the fact that the advertising statements were allegedly made with the knowledge that they were false.

Advertising statements concerning the wholesomeness, the safeness, or the freedom from dangerous elements of a product designed for human consumption have served as a basis for imposing liability on the advertiser. Because of the nature of the harm to human life, these claims are a special problem in advertising.

In Lane v. C.A. Swanson[35] action was brought against a packer and advertiser of canned chicken for injury sustained from a bone in the chicken. The product had been advertised as "Boned Chicken...all lucious white and dark meat. No bones. No waste." The court found in favor of the injured plantiff, saying that the packer's advertising was fraudlent and deceitful, thereby resulting in negligence.

A similar case in which packaged chicken was labeled "Ready to Serve Boned Chicken" resulted in a finding for the plantiff who was injured as a result of a bone in the chicken.[36]

In Parish v. Great Atlantic & Pacific Tea Co.,[37] action was brought by a mother against the retailer of jam on behalf of her two infant daughters for breach of warranty and negligence. The infants had eaten jam purchased by their

mother from the retailer. After the children had become ill an investigation revealed worms in the jam. In a lengthy opinion Judge George Starke of the Municipal Court of the City of New York wrote:

> Public policy and the sacredness of human life demands the warranty right of the ultimate consumer be extended...The contract between the manufacturer and the dealer that the food be fit for human consumption is made for the benefit of a third party--not only the purchasers, but the ultimate consumer.[38]

The mother and her two infant daughters were awarded $500. as the retailer of the jam was found guilty of breach of implied warranty for fitness for human consumption.

Although advertising statements as to the wholesomeness of a product have typically served as a basis for imposing liability there are holdings to the contrary.

In Alpine v. Friend Bros.,[39] the plaintiff claimed that advertisements stating the the bread was "sweet, healthful and tasty," and that adults and children could eat as many slices ...as they please without fear of harm" was misrepresentative of the bread, in which the plaintiff found pieces of tin. The court, in an opinion that may have created more problems than it solved, found the plaintiff had no ground for action under the circumstances and that the advertisements did not represent that the bread was free from foreign substances.

Additionally, the courts have ruled that there is no cause for action against an advertiser for a product-caused injury in which it is not shown that the advertised statements complained of are, in fact, untrue.[40] If the statements are verifiable even though the user may be harmed by the product, the advertiser is not at fault, nor is he/she party to the resultant decision.

It is even possible to have used fraudulent, deceitful, or like quality information in an advertisement and not be liable. No matter how false, if the claim made is unrelated to the injury there is no cause for action under warranty law.[41]

Even advertisements in booklets, brochures, etc., in which directions for use are given may become the basis for liability. The courts have typically permitted recovery when the injury resulted from product used in accordance with the given directions.

Such was the case in Sylvestri v. Warner & Swanson Co.,[42] in which the plaintiff sued the manufacturer of a backhoe for injuries resulting while using the product to move boulders. A brochure accompanying the backhoe described the product as having great lifting abilities.[43]

In contrast, the courts have denied recovery where the directions were not found inadequate under the circumstances.

In Vroman v. Sears, Roebuck & Co.,[44] the court moved in favor of the defendant stating that there was no duty of an advertiser of lawnmowers to include in his advertisements a warning of danger that foreign objects might be expelled from the mower's discharge chute.

Please note, however, that under the Consumer Protection Act, such warning is now required in all such advertisement and on the information distributed at the point of sale.

Similarly, in Marcus v. Specific Pharmaceuticals, Inc.,[45] the courts denied recovery for the plaintiff on the ground that an advertised product did not properly warn of danger that might result from use of the product in a certain manner. In the instant case an infant died as a result of a prescription suppository overdose. The parents of the infant contended that the advertisements in medical journals for the product omitted or gave unclear information concerning dosage of the medication. The court dismissed the case stating that information had been given to physicians and was not required in advertisements of prescription medication.

A number of miscellaneous advertising statements have been held actionable in liability cases. Statements indicating that the product could be used safely when mixed with other products,[46] statements referring to the strength, durability or reliability of the product,[47] as well as advertising statements concerning the care used in the manufacturing of products[48] have been held actionable. Although

the settlements have been rather small, the publicity and time lost in litigation make each costly for the advertiser.

Similarly, advertising statements concerning the convenience with which a product can be used[49] and statements that the product should be used with special precautions[50] have been the source of an advertiser's liability in product-caused harm cases.

The courts were the only means of settling consumer product liability cases until the passage of the Magnuson-Moss Warranty Act in 1975. This Act, also referred to as the Federal Trade Commission Act, Public Law 93-637, was signed into law on January 4 of that year and became the first federal involvement in law governing express and implied warranties. Since that time 49 states (all except Alabama) have passed a variety of laws concerning consumer protection, most of which also include laws concerning express and implied warranties.

Passage of the Magnuson-Moss Warranty Act followed a 1972 Supreme Court decision, FTC v. Sperry and Hutchenson,[51] in which the Court gave the Federal Trade Commission the power to forbid acts or practices which are unfair to consumers regardless of whether they cause injury to competitors or have any relationship to anti-trust laws. Justice White wrote:

> Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not have arrogate excessive power to itself, if, in measuring a practice against an illusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the anti-trust laws.[52]

Title I of the Magnunson-Moss Warranty Act prescribes federal standards for written warranties on consumer products and establishes new consumer and Federal Trade Commission remedies for breach of warranties and service obligations. Of major importance, for the first time minimum standards for warranties were established: (1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty; (2) not withstanding section 108 (b), such warrantor may not impose any limitation on the duration of any implied

warranty on the product; (3) such warrantor may not exlude or limit consequential damages for breach of any written or implied warranty on such produce, unless such exclusion or limitation conspiciously appears on the face of the warranty; and (4) if the product (or componant part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be).[53] Such standards are minimal and the law specifically states that nothing in any section suggests that remedy superseded any provision of state law regarding consequential damages for product connected injury to the person.

Title II of the Act, generally called the "FTC Improvement Act," constitues the most significant amendment to the FTC Act since it was originally enacted in 1914. In general, the new legislation expands the jurisdiction of the Commission to matters "in or affecting" commerce, confirms the Commission's authority to promulgate trade regulation rules defining unfair or deceptive acts or practices, and significantly augments the Commission's arsenal of weapons in the field of consumer protection."[54]

The Warranty Act further grants to the FTC authority to prescribe rules governing the manner and form in which warranty information on consumer products must be presented or displayed so as not to mislead the reasonable average consumer.[55]

Although the Commission has not yet prescribed rules to govern advertising of warranties as such, it enforces the basic standard put forth in the 1960 version of "Guides Against Deceptive Advertising of Guarantees."[56] It has begun related rule development as seen in the 1976 modifications of parts 701 and 702.[57]

Senator Magnuson, in introducing the bill initially said, "The bill is designed to promote understanding. Far too frequently, there is paucity of information supplied to the consumer about what in fact is offered him in that piece of paper proudly labeled 'warranty'."[58] That spirit is obvious in the rules as they are being developed.

The Guides specifically require that warranties of advertising must clearly and conspicioully disclose the nature of the warranty, including what part of the product is warranted, what part of the product is excluded from the warranty and what, if anything, the consumer is required to do before receiving warranty service. The Guides specifically require warranty advertisements to disclose the manner in which the warrantor will perform and the identity of the warrantor.

The FTC has found many advertisers guilty of misleading and incomplete advertising since it was given the power to so regulate. The full report of the agency's activities is much too long to present in detail, however, there are several cases which deserve attention.

In New Rapids Carpet Center, Inc., et.al.[59] the Commission ordered a retailer of carpets, furniture and major appliances not only to cease using bait and switch tactics and other unfair and deceptive advertising techniques, but to cease failing to make relevant disclosures in contracts regarding quanity and cost unit data and the consumer's right to cancellation and refund.

In an action arising from false and misleading claims of a firm's hair replacement process and the firm's failure to disclose that the implantation process involved surgical implantation of sutures which can cause pain, infection and scarring, and other disorders, the Commission required that the firm advise prospective customers to consult with a physician prior to contracting to undergo the process and to provide customers with a three-day cooling off period in which the contract may be cancelled with full refund.[60] The FTC further required that the firm devote 15 percent of their advertisements to disclosures warning prospective customers of the inherent dangers associated with the hair inplantation process.[61]

The advertising industry now lives in a world of double and perhaps triple jeopardy of FTC, state trade commissions, and civil (and occasionally criminal) court proceedings. It is possible for a given product-related advertisement to encounter difficulty with the FTC, the states, and then to become apart of legal action taken in court. Ford Motor Company, Chevrolet Motor Company and Acnestatin are examples which provoked national media coverage. In each case,

compliance with public law was required on all three levels. And, not coincidentally, action is still continuing in each situation. The doctrine of caveat emptor created an atmosphere of miscarried justice for the consumer; it is entirely possible that the doctrine of "caveat vendor" will be just as conducive to the miscarriage of justice, now, however, directed at the vendor and his/her agent, the advertising practitioner.

Endnotes

1. Walter H. E. Jaeger, "Warranties of Merchantability and Fitness for Use: Recent Developments," 16 Rutgers L. Rev. 493, at 493, (1962).

2. "Advertisement" refers to newspaper, magazine and broadcast advertisements, billboards, posters, circulars and advertising pamphlets designed to attract attention from the public to a particular product. The defination includes labels, booklets of instruction and other literature distributed with a product.

3. Ketterer v Armour & Co., 200 Fed. 322, at 323 (S.D.N.Y. 1912).

4. Ford Motor Co. v Mathis, 322 F2d 267 (5th Cir, Ten 1970).

5. See also: Davidson v Montgomery Ward & Co. (1912) 171 Ill App 355; Dudley Sports Co. v Schmitz (1972, Ind App) 279 NE2d 266; Carney v Sears, Roebuck & Co. (1962, CA4 Va) 309 F2d 300; Walker v Decora, Inc. (1971) 225 Tenn 504, 471 SW2d 778; and Wagner v Larson (1965) 257 Iowa 1201, 136 NW2d 312.

6. Rubbo v Hughes Provision Co. (1941) 138 Ohio ST 178, 20 Ohio Ops 233,34 NE2d 202.

7. Gizzi v Texaco, Inc. (1971, CA 1 PA) 437 F2d 308.

8. King v Ohio Valley Terminex Co. (1948) 309 Ky 35, 214 SW2d 993 (dictum).

9. 77 C.J.S. Sales sec. 301 (1952)

10. Bertha Rothe White, The Law of Buying and Selling, 2d ed. (Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1979), p. 17.

11. Acnestatin FTC Dkt. #9109, May 10, 1979.

12. U.C.C. sec. 2-314, 2-315.

13. U.C.C. sec. 2-315.

14. Anderson v Taylor (1937) 223 Iowa 1033, 274 NW 48.

15. See also: Le Blanc v Louisiana Coca-Cola Bottling Co. (1952) 221 La 919, 60 SO2d 873; Tedder v Pepsi-Cola Bottling Co. (1967) 270 NC 301, 154 SE2d 337; Coca-Cola Bottling Co. v Enas (1942 Tex Civ App) 1964 SW2d 855, 858; and Jacob E. Decker & Sons v Capps (1942) 139 Tex 609, 164 SW2d 181.

16. Markovich v McKesson & Robbins, Inc. (1958) 106 Ohio App 265,7 Ohio Ops 2d 10, 78 Ohio L Abs 111, 149 NE2d 181.

17. Hamon v Digliani (1961) 148 Conn 710, 174 A2d 294.

18. Ibid, at 297-298.

19. Murphy v Plymouth Motor Corp. (1940) 3 Wash 2d 180, 100 P2d 30.

20. Land v General Motors Corp. (1965, ND) 136 NW2d 805.

21. Minnesota Public Interest Research Group v Ford Motor Co. St. Louis County Ct. (Habbing Minn.), Jan. 10, 1978, Before Judge Wilson.

22. U.C.C. sec. 2-314.

23. U.C.C. sec. 2-314.

24. Dyson v General Motors Corp. (1969) DC, Pa) 298 F/Supp 1064. See also: Roberts v Anheuser Busch Brewing Assoc. (1912) 211 Mass 449, 98 NE 95; Rachlin v Libby-Owens-Ford Glass Co. (1938, CA2 NY) 96 F2d 597; Dobbin v Pacific Coast Coal Co. (1946) 25 Wash 2d 190,170 P2d 642; and Evans v Sears, Roebuck & Co. (1934) 49 Ga App 744, 176 SE 843.

25. Hardy v Procter & Gamble Mfg. Co. (1954, CA5 Tex) 209 F2d 124.

26. Jones v Raney Chevrolet Co. (1938) 213 NC 775, 197 SE 757.

27. See also: Crist v Art Metal Works (1930) 230 App Div 114, 243 NYS 496 aff'd without op 255 NY 624, 175 NE 341; Valmas Drug Co. v Smoots (1920, CA6 Mich) 269 F 356; and Rosenbusch v Ambrosia Milk Corp. (1917) 181 App Div 97, 168 NYS 505.

28. See: Banko v Continental Motor Corp. (1966, CA4 Va) 373 F2d 314; Alpine v Friend Bros. (1923) 244 Mass 164, 138 NE 553; and Young v Parke and Davis Co. (1912) 49 Pa Super 29.

29. McGee v Bennett (1945) 72 Ga App 271, 33 SW2d 577 and Gibson v California Spray-Chemical Corp. (1948) 29 Wash 2d 611, 188 P2d 316.

30. Ebers v General Chemical Co. (1944) 310 Mich 261, 17 NW2d 176.

31. Hoffman v A. B. Chance Co. (1972, DC Pa) 339 T Supp 1385.

32. Economy Hog and Cattle Powder Co. v Compton (1922) 191 Ind 222, 135 NE 1.

33. Marsh v Usk Hardware Co. (1913) 73 Wash 543, 132 P 241. See also: Baxter v Ford Motor Co. (1932) 168 Wash 456, 12 P2d 409, 88 ALR 521, and Roberts v Anheuser Busch Brewing Co. (1912) 211 Mass 449, 98 NE 95.

34. Cooper v R. J. Reynolds Tobacco Co. (1956, CA1 Mass) 234 F2d 170.

35. Lane v C. A. Swanson (1955) 130 Cal App 2d 210, 278 P2d 723.

36. Bryer v Rath Packing Co. (1959) 221 Md 105, 156 A2d 442.

37. Parish v Great Atlantic & Pacific Tea Co. 13 Misc. 2d 33, 177 N.Y.S. 2d 7 (N.Y. Munic. Ct. 1958).

38. See also: Roberts v Anheuser Busch Brewing Co. (1912) 211 Mass 449,

98 NE 95; Hamon v Digilani (1961) 148 Conn 710, 174 A2d 294; Mahlstedt v Ideal Lighting Co. (1915) 271 Ill 154, 110 NE 795; Ebers v General Chemical Co. (1944) 310 Mich 261, 17 NW2d 176; Rosenbusch v Ambrosia Milk Co. (1917) 181 App Div 97, 168 NYS 505; Rogers v Toni Home Permanent Co. (1958) 167 Ohio ST 244,4 Ohio Ops 2d 291, 147 NE2d 612,75 ALR 2d 103; Hardy v Procter & Gamble Mfg. Co. (1954, CA5 Tex) 209 F2d 124; and Marsh v Usk Hardware Co. (1913) 73 Wash 543. 132 P 241.

39. Alpine v Friend Bros. (1923) 244 Mass 164, 138 NE 553.

40. Dobbin v Pacific Coast Coal Co. (1938, CA2 NY) 96 F2d 642.

41. Rachlin v Libby-Owens-Ford Glass Co. (1938, CA2 NY) 96 F2d 597.

42. Sylvestri v Warner & Swanson Co. (1968, CA2 NY) 398.

43. See also: Sawan Inc. v American Cyanamid Co. (1955) 211 Ga 764, 88 SE2d 152, conformed to 92 Ga App 598, 89 SE 2d 565 and McClanahan v California Spray-Chemical Corp. (1953) 194 Va 842,75 SE2d 712.

44. Vroman v Sears, Roebuck & Co. (1967, CA6 Mich) F2d 732.

45. Marcus v Specific Pharmaceuticals, Inc. (1948) 191 Misc 285, 77 NY S2d 508.

46. Huscher v Pfost (1950) 122 Colo 301, 221 P2d 931.

47. Bahlman v Hudson Motor Car Co. (1939) 290 Mich 683, 288 NW 309 and Turner v Central Hardware Co. (1945) 353 Mo 1182, 186 SW2d 603, 158 ALR 1402.

48. Roberts v Anheuser Busch Brewing Assoc (1912) 211 Mass 449, 98 NE 95 and Torgesen v Schultz (1508) 192 NY 156,84 NE 956.

49. Markovitch v McKesson & Robbins, Inc. (1958) 106 Ohio App 265,7 Ohio Ops 2d 10, 78 Ohio L Abs 111, 149 NE2d 181.

50. Rosenbusch v Ambrosia Milk Co. (1917) 181 App Div 97, 168 NYS 505.

51. FTC v Sperry and Hutchenson 405 U.S. 233 (1972).

52. Ibid.

53. Magnunson-Moss Warranty Act sec. 104 (a).

54. Christopher Smith, "The FTC Improvement Act: The Commission's New Consumer Protection Clout," Warranties In the Sale of Goods 1978, ed. Barkley Clarke, Practicing Law Institute (1978), p. 55. A detailed analysis of the FTC Improvement Act may be found in Kinter and Smith, The Emergence of the FTC as A Formidable Consumer Protection Agency. 26 Mercer L Rev 651 (1975).

55. Magnunson-Moss Warranty Act sec. 102 (b) (1) (B).

56. "Guides Against Deceptive Advertising of Guarantees" (16CFR 239).

57. Ibid (16CFR (1) (c) (701/2).

58. Senate comm. on Commerce, Report on S 356, S. Rep. No. 93-151, 93rd Cong., 1st Sess, at 6.

59. New Rapids Carpet Center, Inc. FTC Dkt. #9052, July 26, 1977.

60. Hair Replacement Centers of Boston, Inc. FTC Dtk. #2819, May 17, 1976.

61. See also: May Day Company, Inc., Et. Al. FTC Dkt. #2866, Nov. 12, 1976; Sonotone Corporation FTC Dkt. #9009, Sept. 13, 1976; Lindal Ceder Homes, Inc. FTC Dkt. #2774, Jan. 5, 1976; and Block Drug Co., Inc., Et. Al. FTC Dkt. #9050, Dec. 21, 1977.